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**FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY**

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

In the Matter of )  
 )  
**MOBILEMEDIA CORPORATION, et al.** )  
 )  
Applicant for Authorizations and Licensee )  
of Certain Stations in Various Services )

WT DOCKET NO. 97-115

**DOCKET FILE COPY ORIGINAL**

To: The Commission

**WIRELESS TELECOMMUNICATIONS BUREAU'S CONSOLIDATED COMMENTS  
ON REQUESTS FOR CLARIFICATION**

1. On September 3, 1997, MobileMedia Corporation ("MobileMedia") filed a request for clarification of a provision in the Commission's Order, FCC 97-284 (released August 8, 1997) ("Reconsideration Order") which reconsidered its earlier Order, 97-197 (released June 6, 1997) ("Stay Order"). On September 5, 1997, MobileMedia employees Mark Witsaman and Debra Hilson each filed a request for clarification of the same provision. Also, on September 5, 1997, John M. Kealey, former MobileMedia Chief Operating Officer and President, filed a petition seeking reconsideration and modification or clarification of the Reconsideration Order. The Chief, Wireless Telecommunications Bureau ("Bureau"), by his attorneys, now comments on those requests and the petition.<sup>1</sup>

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<sup>1</sup> Under Section 1.4 of the Commission's Rules, the deadline for responding to MobileMedia's request would normally be September 16, 1997. However, responses to the requests of Witsaman and Hilson and to Kealey's petition (see § 1.106(g)) were not due under the Commission's Rules until September 18, 1997. In order to address these matters efficiently, the Bureau has combined its response to all four petitions in the instant consolidated pleading, which is being filed on the September 18th deadline. Both the Office of General Counsel and MobileMedia have informally consented to an extension of the deadline for responding to MobileMedia's request.

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## PROCEDURAL HISTORY

2. From 1993 through 1996, MobileMedia filed at least 289 false FCC Forms 489, misrepresenting to the Commission that unconstructed stations were constructed, operating, and providing service to subscribers.<sup>2</sup> MobileMedia also filed with the Commission at least 94 false "40-Mile Rule" applications for new paging facilities that were predicated upon unbuilt facilities. Id. On April 8, 1997, the Commission designated a hearing to determine whether MobileMedia is qualified to remain a Commission licensee. Id. Among other things, the Commission sought to determine which corporate officers, directors and senior managers of the company participated in, approved of, or knew about the false filings. Id. at ¶¶ 9, 14(a), (c) and (d). The hearing was scheduled to commence on June 10, 1997.

3. On April 23, 1997, MobileMedia requested a 10-month stay of the proceedings to provide the company an opportunity to avail itself of special relief under the Second Thursday<sup>3</sup> doctrine to benefit its innocent creditors holding more than \$1.1 billion in debt. On June 6, 1997, the Commission granted this requested relief. Stay Order, supra. However, to ensure that no potential wrongdoer of MobileMedia benefited from the stay, the Commission imposed conditions in paragraphs 17 and 18 of the Stay Order.

4. In paragraph 17, the Commission first defined "potential wrongdoers" as including "all former and current officers, directors, and senior managers." Stay Order at ¶17. Second, it directed MobileMedia to demonstrate in its Second Thursday showing that "its former and current officers, directors and senior managers will not receive compensation for their equity

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<sup>2</sup> Order to Show Cause, Hearing Designation Order, and Notice of Opportunity for Hearing for Forfeiture, FCC 97-124 (released April 8, 1997) ("HDO"), at ¶ 5.

<sup>3</sup> Second Thursday Corp., 22 FCC 2d 515 (1970), recon. granted, 25 FCC 2d 112 (1970).

interests and will have no role in the future operation and management of the company." Id.

Third, the Commission prohibited MobileMedia's current officers, directors, and senior managers from selling their MobileMedia stock during the pendency of the stay. Id.

5. In paragraph 18, the Commission directed that no application in which any former or current officer, director or senior manager of MobileMedia has an attributable interest shall be granted until the issue as to that individual's involvement in the MobileMedia wrongdoing is resolved. Id. at ¶18. In that regard, the Stay Order further directed the Bureau to prepare a list of former and current officers, directors and senior managers of MobileMedia. Id.

Pursuant to the Stay Order, on June 25, 1997, the Bureau developed and distributed a list of 43 MobileMedia former and current officers, directors and senior managers, to assist other Bureaus and Offices of the Commission in identifying those applications in which potential wrongdoers have an attributable interest.<sup>4</sup>

6. After issuing the Stay Order, the Commission received six petitions for reconsideration or clarification, from interested entities and employees, contending, among other things, that paragraph 18 of the Stay Order was overly broad. Reconsideration Order at ¶5. On August 8, 1997, in response to the petitions it had received, the Commission issued its Reconsideration Order, concluding that paragraph 18 "was overly broad in scope and that the allegations against MobileMedia are sufficient to raise questions only as to the qualifications of four individuals." Id. at ¶8. The Commission thus reduced the applicability of the restrictions in paragraph 18 from 43 individuals to four -- Gene Belardi, Kenneth McVay,

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<sup>4</sup> Pursuant to the Order, the Bureau distributed an initial list on June 16, 1996. Counsel for MobileMedia subsequently informed the Bureau that certain information they had provided for the purpose of preparing the list was erroneous. Thereafter, counsel for MobileMedia provided revised and corrected information. As a result, a revised and corrected list was distributed on June 25, 1997.

John Kealey and Gregory Rorke. Based on all the information before it, the Commission found that substantial and material questions of fact remained unresolved with respect to those four individuals. Further, the Commission indicated that "no application in which any of these four individuals has an attributable interest may be granted until the qualifications question has been resolved in that [proceeding] or the MobileMedia proceeding." Id.

### **ARGUMENT**

**A. The Bureau Agrees with MobileMedia, Mark Witsaman and Debra Hilson that Clarification Is Appropriate**

7. MobileMedia, Mark Witsaman and Debra Hilson request clarification from the Commission whether the conditions in paragraph 17 of the Stay Order only apply to the same four individuals that the Reconsideration Order listed as potential wrongdoers in paragraph 18. MobileMedia states reasons why it believes that the Reconsideration Order *implicitly* relieved 39 of the 43 former and current officers, directors, and senior managers of MobileMedia (whom the Bureau had listed pursuant to the Stay Order) of the restrictions of paragraph 17 as well as 18. However, because the Reconsideration Order did not do so *explicitly*, MobileMedia, as well as Mr. Witsaman and Ms. Hilson, seek formal clarification that paragraph 17 is so restricted to the four individuals.

8. MobileMedia argues that it would be inconsistent for the Commission to exempt individuals from the scope of paragraph 18 but apply the restrictions in paragraph 17 to those individuals. While the Bureau expresses no opinion on the merits of MobileMedia's argument, the Bureau agrees with MobileMedia that clarification of the Commission's intentions is appropriate. MobileMedia's request raises important issues, and further clarification from the Commission would assist the Bureau in processing any Second

Thursday showing MobileMedia may make. If MobileMedia's request is granted, the only suspected wrongdoers for which MobileMedia will have to make a Second Thursday showing are Billiard, McVay, Kealey, and Rorke. If, on the other hand, the Commission denies MobileMedia's motion at this time, the Commission would at least leave open the possibility of requiring MobileMedia to make a Second Thursday showing with respect to other individuals who may have participated in or had knowledge of the false filings. Furthermore, if MobileMedia's request is granted, all of MobileMedia's current officers, directors, and senior managers will be free to sell their stock in MobileMedia. While the Bureau takes no position on whether it would be appropriate for the Commission to grant the relief MobileMedia seeks, it agrees that clarification is appropriate.

**B. THE BUREAU OPPOSES THE KEALEY PETITION FOR RECONSIDERATION AND MODIFICATION OR CLARIFICATION OF RECONSIDERATION ORDER**

9. John Kealey's petition is fundamentally different from the clarification requests made by MobileMedia and the two current employees of MobileMedia, Mr. Witsaman and Ms. Hilson. Mr. Kealey, Chief Operating Officer and President of MobileMedia, was fired in July, 1996, for reasons not attributed to the filing of the false 489 FCC forms. Unlike the two current Mobilemedia employees, he *is* one of the four individuals specifically named in the Reconsideration Order as a potential wrongdoer after the Commission narrowed the scope of paragraph 18 of the Stay Order.

10. In his petition, Mr. Kealey seeks either removal of his name from the list of potential wrongdoers, or clarification of the Reconsideration Order so as to define a procedure by which he can proffer his qualifications to be a Commission licensee and clear his name. Mr. Kealey argues that his name should be removed from the "potential wrongdoers" list

based on his declaration denying any knowledge of the alleged wrongdoing. He also argues that it is inconsistent for the Commission to retain his name on the list while removing the 39 other individuals. (Kealey Request, pp. 7-9.) Mr. Kealey's argument should be rejected because he is in a fundamentally different position than the other individuals who were removed from the list under the Commission's Reconsideration Order. Namely, there is ample evidence of record that warrants classifying Mr. Kealey as a "potential" or "suspected" wrongdoer under Second Thursday. For instance, MobileMedia submitted an initial factual report to the Commission on October 15, 1996, which outlined findings of the company's internal investigation of the matter. In the report, MobileMedia identified several pieces of evidence which suggests Mr. Kealey, while holding the position of MobileMedia's Chief Operating Officer, knew of and acquiesced in the wrongdoing in question. According to MobileMedia's report, MobileMedia's Regulatory Counsel and General Counsel claim that Kealey knew of and approved the inaccurate filings. MobileMedia Report, filed October 15, 1996, at 13-14. The report states that when one MobileMedia employee informally questioning Kealey about the propriety of the inaccurate filings, Kealey reportedly responded that "because we are a small company, we are able to assess risks in a different way." (Id.) Other MobileMedia employees who were interviewed generally believed that Kealey was aware of the inaccurate filings. Id. The report also cited events and documents subsequent to the inaccurate filings that suggested that Kealey was aware of the false filings. (Id. at 14-15, n. 11). MobileMedia did not present such evidence with respect to the 39 individuals removed from the list in the Reconsideration Order. Thus, there exists sufficient record evidence for including Mr. Kealey on the "potential wrongdoers" list and his inclusion is

consistent with the removal of the other individuals from the list.

11. Next, Mr. Kealey argues that the Commission should clarify the Reconsideration Order by articulating a procedure by which he can clear his name, regardless of the stay of the hearing imposed by the Commission, or the outcome of the Second Thursday relief, and without his having a license application or attributable interest in a Commission license. The Bureau disagrees with these arguments. The Bureau notes that Mr. Kealey's argument is actually a challenge of the Stay Order, not the Reconsideration Order because Mr. Kealey was included in the "potential wrongdoer" list in the Stay Order. Mr. Kealey was therefore required to make this argument in a petition for reconsideration of the Stay Order. Six other entities filed petitions of the Stay Order challenging the provisions of the Stay Order. Some of those entities made due process arguments similar to the arguments Kealey is now attempting to raise. After the Stay Order was released, however, Mr. Kealey did nothing. Since Mr. Kealey's petition was not filed within thirty days after the Stay Order was released, his petition should be dismissed. Section 1.106(f) of the Commission's Rules.

12. Mr. Kealey's argument that there is no effective procedure by which he could clear his name is not accurate. The Reconsideration Order points out that Mr. Kealey's qualifications can be resolved in the context of (a) the MobileMedia proceeding or (b) any application in which Mr. Kealey has an attributable interest. If MobileMedia cannot present a Second Thursday showing acceptable to the Commission, a full hearing on the issues designated by the Commission will take place. Mr. Kealey argues that if a hearing is held, the Administrative Law Judge (ALJ) would be unlikely to resolve his qualifications because he is not currently associated with MobileMedia. Kealey Petition at 10. Mr. Kealey's argument

ignores the HDO, which requires the ALJ to identify "all officers, directors and senior management personnel who participated in, orchestrated, approved, condoned, or had knowledge..." Mr. Kealey can also resolve his qualifications in the context of a license application in which he has an attributable interest. Kealey states he does not have such an interest currently, and would have us believe that the likelihood of his ever having such an interest is now so remote (due to the "shadow" of the Reconsideration Order) as to preclude his ever having an opportunity to do so. If Kealey does not intend to file an application in which he has an attributable interest in a license, he has not suffered a cognizable injury from the Commission's decision to defer action on any such applications. On the other hand, if Kealey does file an application in which he has an attributable interest, he would then have the hearing he seeks on his qualifications.<sup>5</sup>

13. Kealey next argues that, according to the Due Process Clause of the Fifth Amendment, he should be given an opportunity for a hearing on his qualifications to clear his name. The Bureau disagrees that Kealey has a constitutional right to have a hearing at this time on his qualifications. Kealey has failed to satisfy the requirements for establishing a due process violation. "Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the due process Component of the Equal Protection Clause of the Fifth Amendment." Communications

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<sup>5</sup> The cases Kealey cited as authority for his due process argument are misapplied. The cited cases involve government action without any opportunity for a hearing on the matter. See e.g., Goss v. Lopez, 419 U.S. 565 (1975)(students subject to temporary suspension from public school were entitled to protection under the due process clause); and Kartseva v. Department of State, 37 F.3d 1524 (D.C. Cir. 1995) (employee's allegations that she was discharged from her position as Russian translator after Department of State ruled, without a hearing, that employee was ineligible to work on contract with Department because of security concerns was sufficient to state claim against Department for violation of her due process rights). Here, there are opportunities for Kealey to obtain the hearing he seeks; therefore, Kealey is not deprived of any rights.



Satellite Corporation, 3 FCC Rcd 7108, 7111 (1988) (emphasis added); see also, Michael D. Bramble, 58 FCC 2d 565, 567-70 (1976). Once an interest has been identified, the party seeking due process protection must show that government action has caused significant, grievous injury to the protected interests. Communications Satellite Corporation, supra. Only after this showing is made is due process required. The required elements of due process are adequate notice and an opportunity for hearing appropriate to the nature of the case. Id.; In re Applications of PCS 2000, L.P. For Broadband Block C Personal Communications Systems Facilities, FCC 97-15 (released January 22, 1997), at ¶ 32; see also Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards, 11 FCC Rcd 6835, 6844 (1996).

14. Here, Kealey has not suffered any due process violation because the interest he has identified is not an interest which requires due process protection. Kealey's sole claim of harm is that his name appears on a list of "potential" wrongdoers and that is "interfering with [his] reputation and depriving him of employment ..." Id. The Supreme Court has specifically held that injury to reputation alone is not a "liberty" or "property" interest protected under the Constitution. Paul v. Davis, 424 U.S. 693 (1976), reh. denied, 425 U.S. 985 (1976) (inclusion of plaintiff's photograph on police flyer of "active shoplifters" constituted injury to reputation and, by itself, was not a "liberty" interest protected by the Constitution); see also, Siegert v. Gilley, 500 U.S. 226 (1991) (government supervisor's submission of defamatory letter to prospective employer of former government employee did not constitute violation of any constitutional right), reh. denied 501 U.S. 1265 (1991). In light of the Supreme Court's decision in Paul and Siegert, the facts Kealey alleges do not

provide a sufficient basis for a claim that his due process rights have been violated. First, the substance of his claim, is akin to those involved in Paul and Siegert, where injury to reputation alone was found not to be a protected constitutional interest. Second, the Commission has not taken any final action which directly affects his future employment. The Commission, for its administrative processing purposes, has noted Kealey as a "potential wrongdoer" whose applications could not be granted without resolution of his character qualifications. It has not concluded that he in fact engaged in misconduct. Even if Kealey's claim did constitute a protected interest, he has failed to show that his name being on the list has caused him a significant, grievous injury. He has offered no evidence that he has failed to get employment because of his name appearing on the list.

15. In conclusion, the Bureau believes that it is appropriate for the Commission to consider MobileMedia and the two current employees' requests for clarification. However, the Bureau does not believe that Kealey has set forth a sufficient basis for the Commission to

clarify the Reconsideration Order to set yet another Commission procedure by which Kealey can demonstrate that he is qualified to be a Commission licensee.

Respectfully submitted,

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September 18, 1997

## CERTIFICATE OF SERVICE

I, John J. Schauble, an attorney in the Enforcement and Consumer Information Division, Wireless Telecommunications Bureau, certify that I have, by first class U.S. mail, this 18th day of September 1997, sent copies of the foregoing "Wireless Telecommunications Bureau's Consolidated Comments on the Requests for Clarification," to:

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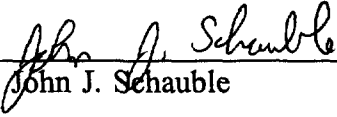
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